Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 77-1591

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

RECORDER'S COURT JUDGE,
(In the matter of *The People* v *Janice Lee Alexander*),
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

ARE THE RULES OF LAW GOVERNING THE ADMISSIBILITY OF CONFESSIONS, AS DECIDED IN *MIRANDA* v *ARIZONA*, CURRENTLY APPLICABLE TO STATE PROSECUTIONS?

II.

SHOULD THE CONFESSION OF A DETAINED SUSPECT BE ADMITTED IN EVIDENCE WHERE THE SUSPECT, UPON BEING ADVISED OF THE RIGHT TO COUNSEL, ASKED THE INTERROGATING OFFICER, "DO YOU THINK I NEED AN ATTORNEY?", AND IS TOLD IN REPLY, "I THINK YOU SHOULD TELL ME WHAT HAPPENED", AND THE CONFESSION FOLLOWS?

COUNTER-STATEMENT OF FACTS

The criminal defendant in the case out of which the above-referenced appellate proceedings arose was arrested and charged with murder in the second degree under Michigan Statute, MCLA 750.317. She was advised of her rights under *Miranda* v *Arizona,* 384 US 436; 16 L Ed 2d 694 (1966), including, specifically, her right to counsel. Thereafter, she asked the officer who had advised her, whether he thought she should have a lawyer, whereupon the officer replied, "I think you should tell me what happened." The defendant's inculpatory statement followed and the same was offered in evidence upon preliminary examination in the Recorder's Court of Detroit. The magistrate excluded the statement which was the sole evidence offered in support of probable cause. In consequence of such exclusion requisite probable cause was not shown for holding the defendant for trial and the case was dismissed.

The petitioner, by the prosecuting attorney for Wayne County, sought an Order of Superintending Control in the form of writ of mandamus in the Wayne County Circuit Court to direct the magistrate to reinstate the said case and bind the defendant over for trial. Briefs were filed on behalf of the petitioner (the people) and on behalf of respondent, Judge of the Recorder's Court. Upon hearing arguments of counsel, the Circuit Court denied the petition.

The petitioner appealed the Circuit Court's order to the (intermediate) Michigan Court of Appeals, which affirmed the Wayne County Circuit Court in its denial of an order reinstating the criminal case. The petitioner then sought leave to appeal to the Michigan Supreme Court. Leave was denied by that Court and the petitioner now seeks a writ of certiorari from this Court to the Michigan Court of Appeals.

REASONS FOR DENYING WRIT

I.

THE RULES OF LAW DECLARED IN *MIRANDA* v *ARIZONA*, AS GOVERNING THE ADMISSIBILITY OF CONFESSIONS REMAIN APPLICABLE TO STATE PROSECUTIONS.

Put in its most simple terms, the thrust of the petitioner's argument seems to be that this Court has declared, by dicta or inference in at least two cases, that the legal principles governing the admissibility of confessions as laid down in *Miranda* v *Arizona,* 384 US 436; 16 L Ed 2d 694, 86 S Ct 1602 (1966), are no longer applicable to State prosecutions. Petitioner cites as purported authority for that proposition, the cases of *Michigan* v *Tucker,* 417 US 433, 41 L Ed 2d 182, 94 S Ct 2357 (1974), and *Harris* v *New York,* 401 US 222, 28 L Ed 2d 1, 91 S Ct 644 (1971).

To take petitioner's contention seriously is to reject the long line of decisions handed down by this Court beginning with *Mapp* v *Ohio,* 367 US 643, 1 L Ed 2d 1081, 81 S Ct 1684 (1961), which made the exclusionary rule of *Weeks* v *United States,* 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914), applicable to the States through the due process clause of the Fourteenth Amendment to the Federal Constitution. Indeed, it is folly to argue that a decision of the United States Supreme Court, having the scope and profundity of *Miranda* as well as its preciseness and clarity, would be nullified by strained and tortured inferences.

Actually, one could examine and reexamine in vain the opinions in both *Tucker* and *Harris* in a search for language from which a conclusion could fairly and reasonably be drawn to the effect that the principles of *Miranda* no

longer apply to State prosecutions. Petitioner quotes no such language and makes no apt reference thereto. Respondent respectfully urges that petitioner misinterprets the express language of these opinions and misreads their import, as well. The opinion of the majority in *Tucker* was substantially limited to the conclusion that *Miranda* was inapplicable to a "post-*Miranda*" trial in which the admissibility of a "pre-*Miranda*" statement was at issue, and that on the basis of the pertinent facts in the case the defendant's constitutional rights had not been violated.

Petitioner emphasizes the use of the term "prophylactic standards" as used in *Miranda* in relations to suspects' confessions given while in custody, that phrase is merely descriptive of the standards prescribed, which themselves, are necessarily complimentary to the long-standing voluntariness requirement, rather than alternative to it. It is fair to say that these standards constitute an indispensable hallmark of the voluntariness requirement without which voluntariness can hardly be judicially recognized. No one seriously disputes any longer that voluntariness is the threshold over which confessions pass into evidence. In *Jackson* v *Denno,* 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964), this Court said at page 376 (US):

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession without regard for the truth or falsity of the confession, *Rogers* v *Richmond,* 365 US 534, 81 S Ct 735, 5 Led2d 760. . . . *Malinski* v *New York,* 324 US 401, 65 S Ct 781, 89 Led2d 1029; *Stroble* v *California,* 343 US 181, 72 S Ct 599, 96 Led 872; *Payne* v *Arkansas,* 356 US 560, 78 S Ct 844, 2 Led2d 975. . . ."

The principle recited in *Jackson* v *Denno* and stated in one form or another in the cases cited therein, is an ancient one in American law. Its applicability to state court prosecu-

tions has gone virtually unquestioned for many, many years. *Malinski* v *New York, supra; Chambers* v *Florida,* 309 US 227, 60 S Ct 472, 84 L Ed 716 (1940). *Denno* itself arose, of course, out of a state court prosecution. Absent an express ruling by this Court to such effect, it is absurd to argue that the principle that voluntariness is an indispensable requirement for the admission of a confession into evidence is no longer applicable to state prosecutions. If, as respondent contends, the principles or standards laid down in *Miranda* are necessary compliments to the voluntariness requirement, it is equally absurd to argue that those principles or standards no longer apply to state prosecutions, absent an express declaration by this Court to that effect, likewise. The recent decision of the Court in *Brewer* v *Williams,* ..... US ....., 51 L Ed 2d 424, 97 S Ct ..... (1977), by implication at least, runs counter to the contention made by petitioner, albeit, that its basis was more substantially the Sixth Amendment to the Federal Constitution rather than the Fifth Amendment and Sixth Amendment, as was the opinion in *Miranda.*

To be sure, this Court in *Brewer* v *Williams, supra,* pp 435, 437 (L Ed 2d) acknowledged the doctrine of *Miranda* v *Arizona, supra,* virtually as one taken for granted. Citing *Michigan* v *Tucker, supra* (relied heavily upon by the petitioner), the Court made a point of saying that a review of the doctrine was unnecessary.

In conclusion on this point, respondent suggests the obvious question: If the doctrine of *Miranda* no longer applies to state prosecutions, would it not have been far more expeditious and judicially economical for this Court to have summarily denied certiorari in such cases as *Michigan* v *Mosely,* 423 US 96, 46 L Ed 2d 313, 96 S Ct 321 (1975), rather than consider the issue of the validity of the con-

fession therein involved on its merits and find that there was, under the facts, no violation of *Miranda*.

No case decided by this Court since *Miranda* v *Arizona, supra,* has provided any basis for a conclusion that the doctrine pronounced therein has no further applicability to the States. Respondent contends that the doctrine remains so applicable.

II.

THE CONFESSION OF A DETAINED SUSPECT SHOULD NOT BE ADMITTED IN EVIDENCE, WHERE THE SUSPECT, UPON BEING ADVISED OF THE RIGHT TO COUNSEL, ASKS THE INTERROGATING OFFICER, "DO YOU THINK I SHOULD HAVE AN ATTORNEY?", IS TOLD BY THE OFFICER IN REPLY, "I THINK YOU SHOULD TELL ME WHAT HAPPENED", AND THE CONFESSION FOLLOWS.

Respondent recognizes that the argument, as stated cannot be bracketed within the framework of petitioner's Question II. However, respondent rejects the question put by petitioner as not embracing the ultimate issue to be resolved. While it may be praiseworthy and indicative of legal scholarship for the petitioner to argue that *Miranda* v *Arizona, supra,* is not supported by the Fifth Amendment to the Federal Constitution (as the honorable dissenting justices did in that case and in the case of *Michigan* v *Mosely,* 423 US 96, 46 L Ed 2d 313, 96 S Ct 321 (1975), the argument is academic inasmuch as the Court's prevailing opinion remains undisturbed. Petitioner has not said in its brief, except perhaps obliquely, that it should be.

Thus, respondent argues on the basis of the assumption that *Miranda* prevails as the law governing in-custody interrogation and confession, and contends that the confession involved in the instant case falls within its ambit, and is not admissible in evidence.

It is not disputed in this case that immediately after being advised of her right to counsel, the defendant asked the interrogating officer if he thought she should have an attorney. Whether this amounted to a request for counsel in fact, is, to a degree, immaterial. It is clear that it provoked the officer to admonish defendant to "tell me what happened". That could mean no less than, "if you did it, tell me". Such an approach rendered meaningless the inclusion of advice of right to counsel in the "*Miranda*" warning. This Court said (384 US 445):

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. *The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.* If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning." (Emphasis added.)

As stated earlier, respondent argues on the basis of an assumption that *Miranda* continues to hold sway. If that is so, it carries, along with its other attributes, the right to counsel before speaking. Indeed, that may be the most important of the *Miranda* standards, for here the accused's rights under the Fifth and Sixth Amendments are wedded. As for the right to counsel generally, it has long been considered fundamental by this Court, notwithstanding *Betts* v *Brady,* 316 US 455, 86 L Ed 1595, 62 S Ct 1252 (1942).

See *Johnson* v *Zerbst,* 304 US 458, 82 L Ed 158, 53 S Ct 55 (1932).

Gideon v *Wainwright,* 372 US 335, 9 L Ed 2d 799, 83 S Ct 792 (1963), reaffirmed the principle that the right to counsel is a fundamental "right of the accused".

Without a single word or phrase which could be reasonably interpreted as waiving the right to counsel, petitioner insists, nevertheless, that the right was waived. Regardless of the philosophical view which one may take of the *Miranda* doctrine, it is beyond argument that by it this Court undertook to implement the Fifth Amendment protection against self incrimination — like that of right to counsel itself, a fundamental right. As already suggested, such rights cannot be so lightly waived. In *Johnson* v *Zerbst, supra,* at page 464, this Court said:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and the conduct of the accused." (Citations omitted.)[1]

This Court's recent opinion in *Brewer* v *Williams, supra,* once again demonstrates that the matter of waiver of fundamental rights is a serious one. The case implicitly rejects the notion that the mere act of giving the statement

[1] Respondent recognizes, of course, that the case cited dealt with waiver of trial counsel.

denotes a waiver of the right to counsel. At 51 L Ed 2d 439, the Court said:

> "The District Court and the Court of Appeals were also correct in their understanding of the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law — that it was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v *Zerbst,* (supra) at 464 82 L Ed 1461, 58 S Ct 1019. . . . That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, (citations omitted), and that courts indulge in every reasonable presumption against waiver. (Citations omitted) . . ."

So, in this case one must ask if *Miranda* says that the accused must have been advised of her right to counsel, as she was, where is the indication that she waived that right? There is no dispute between the petitioner and the respondent as to the language used by both the interrogating officer and the accused. The question is, can waiver be shown by that interchange? Respondent respectfully submits that it cannot. The statement of the defendant was not properly obtained and was therefore properly excluded from evidence under *Mapp* v *Ohio, supra.*

CONCLUSION

The criminal defendant's confession was obtained in violation of her rights under the Fifth and Sixth Amendments to the Federal Constitution. The rule of law governing the binding of a defendant over for trial in the State of Michigan requires that the order binding a defendant over for trial must be based upon evidence legally admissible. *Peo-*

ple v *Walker,* 385 Mich 565 (1971); *People* v *Gwinn,* 46 Mich App 134 (1973).

The reviewing state courts were correct in holding that the magistrate properly denied the admission of the confession into evidence. The petitioner's application for writ of certiorari should, therefore, be denied.

Respectfully,

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